-131 FILE COPY

FILED
AUG 1 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-131

J. RAY McDERMOTT & CO., INC.,
Petitioner

versus

THE VESSELS MORNING STAR, ET AL, ETC.,
THE FISH MEAL COMPANY, HARVEY W. SMITH
AND TEXAS MENHADEN COMPANY
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVE McNEILL, JR.
ROBERT M. JULIAN
First City National Bank Building
Houston, Texas 77002
KENNEDY J. GILLY
NEAL D. HOBSON
Eleventh Floor Whitney Building
New Orleans, Louisiana 70130
Atorneys for Petitioner,
J. Ray McDermott & Co., Inc.

CONTENTS

Page

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES II

CITATIONS TO OPINIONS BELOW 2

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 4

STATEMENT OF THE CASE 5

JURISDICTION OF THE COURT BELOW 10

REASONS FOR GRANTING WRITS 11

I. The Admiralty Jurisdiction is Exclusive 11

II. It is not the Function of the Court of Appeals to make Findings of Fact, which are the exclusive province of the Trial Court 14

III. WHERE EVIDENCE HAS BEEN ADMITTED TO EXPLAIN THE MEANING OF THE TERMS OF A CONTRACT, THE QUESTION OF INTERPRETATION OF THE CONTRACT IS FOR THE TRIER OF FACTS. 18

IV. THE SMITH INTERESTS HAVE WAIVED THE RIGHT TO CLAIM BREACH OF CONTRACT; THE FIFTH CIRCUIT ERRED IN FAILING TO RULE ON THIS QUESTION. 26

CONTENTS (Continued)

Page

V. A MORTGAGEE IS ENTITLED BY BID IN PROPERTY AT A JUDICIAL SALE ON FORECLOSURE OF A MORTGAGE WITHOUT BEING REQUIRED TO ACCOUNT FOR ALL PROFITS ON A RESALE OF THE PROPERTY. 29

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CONSTITUTIONS

United States Constitution:
Amendment VII 5

STATUTES

United States Code:
28 U.S. Code §1254(1) 2
46 U.S. Code §951 ..... 2, 4, 6, 10, 11, 12

Federal Rules of Civil Procedure:
Rule 9(h) 2, 12

Rule 38(e) 4, 12

Rule 52(a) 5

CASES

Americana of Puerto Rico, Inc. v. Transocean Tankers Corp., 317 F.Supp. 798, 1970 AMC 422 (P.R. 1969) 12

Anderson v. Tway, (6th Cir.) 143 F.2d 95 28

Ballentyne v. Smith, 205 U.S. 285 29

Banks v. Hanover S.S. Corp., 1968 AMC 1066 12

Byrd v. Blue Ridge Rural Electric Corp., 356 U.S. 525, 2 L.Ed.2d 953 19

TABLE OF AUTHORITIES (Continued)

Page

Calvin Watson Motor Sales v. De vaull, 51 Ill.App.2d 125, 201 N.E.2d 1 28

Cantey v. Flensburger Dampf. Shuldt & Co., 1971 AMC 2488 (E.D. N.C. 1971) 12

Cateora v. British Atlantic Assn. Ltd. of Nassau, 282 F.Supp. 167 12

Clearfield Trust Co. v. U.S., 318 U.S. 363 28

DeBuys v. Mollere 3 Mart (N.S.) 318 (S. C. La.) 28

Deitrick v. Greaney, 309 U.S. 190 28

Detroit Trust Co. v. Steamer "Thomas Barlum", 293 U.S. 21 32

Draube v. Reith, 114 So. 2d 879 (La. App.) 21

Easton v. German-American Bank, 127 U.S. 532 29

Eaton v. Laurel Delicatessen Corp., 173 N.Y.S.2d 868, affirmed 185 N.Y.S.2d 551 28

E. H. Taylor, Jr. & Sons v. First Nat. Bank, (6th Cir.) 212 Fed. 898 28

First Nat. Bank v. Smith, 132 Pa.Super. 73, 200 Atl, 215 ..... 28, 29

Fitzgerald v. United States Lines, 374 U.S. 16 12

TABLE OF AUTHORITIES (Continued)

Page

Fitzpatrick v. Flannagan, 106 U.S. 648 28

Graffam v. Burgess, 117 U.S. 180 29

Gulf, C. & S.F. Ry. Co. v. Coca-Cola Bottling Co. of Cleburne, 363 F.2d 465 (5th Cir. 1966) 24

Gulotta v. Swinney, 143 So. 2d 775 28

Gvistsman v. Western King Co., Inc., (C. D. Cal 1967 12

Helm v. Ducayet, 20 La. Ann. 417 28

Hohenstein v. S.M.H. Trading Co., 382 F.2d 530 (5th Cir. 1967) 25

Hoskins v. Point Towing Company 395 F. 2d 737 (3rd Cir. 1968) 12

Hurtig v. Jones, 200 Kan. 89, 434 P.2d 1009 28

Johnson v. United States Ship Bd. E. Fleet Corp., 280 U.S. 320 13

Lambert's Point Towboat Co. v. United States, 182 Fed. 388 (4th Cir.) 29

Lober v. Tooley, 117 P. 2d 421 (Cal. App) 28

Magma Extension Mining Co. v. Kinard, 106 F.Supp. 362, affirmed 198 F.2d 267 28

McAllister v. U.S., 348 U.S. 19 14

TABLE OF AUTHORITIES (Continued)

Page

McCann v. Falgout Boat Co., 44 F.R.D. 34 12

Meyers v. Selznick Company, Inc., 373 F.2d 218 25

Motor Vehicle Casualty Company v. Atlantic National Ins. Co., 374 F.2d 601 (5th Cir., 1967) 24

Osborne v. Doeing Airplane Company, 309 F.2d 99 25

Peace v. Fidalgo Island Packing Co. 419 F.2d 371 (9th Cir. 1969) 12

Pewabic Mining Co. v. Mason, 145 U.S. 349 ..... 29, 30

Sanderlin v. Old Dominion Stevedoring Corp., 281 F.Supp. 1015, 1968 AMC 664 (E.D. Va. 1968) 12

Securities & Ex. Com. v. Chenery 318 U.S. 80 18

Shell Oil Co. v. Texas Gas Transmission Corp., 176 So.2d 692 (La. App. 1964) 19

Starkweather v. Jenner, 216 U.S. 524 ..... 31, 32

Twin-Lick Oil Co. v. Marbury, 91 U.S. 587 31

United States v. Taylor, 293 F.2d 717 25

Wells v. Scindia Steam Nav. Co., Ltd., 1971 AMC 1285 12

Wright v. Mountain Trust Bank, 300 U.S. 440 30

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO.

J. RAY McDERMOTT & CO., INC.,

Petitioner

versus

THE VESSELS MORNING STAR, ET AL, ETC., THE FISH MEAL COMPANY, HARVEY W. SMITH AND TEXAS MENHADEN COMPANY

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. Ray McDermott & Co., Inc. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 15, 1970 (original opinion) and March 23, 1972 (opinion on rehearing en banc).

CITATIONS TO OPINIONS BELOW

The opinion and judgment of the District Court is unreported and is printed in the supplement beginning at page 35. The opinion of the United States Court of Appeals for the Fifth Circuit dated September 15, 1970 (Circuit Judges Bell, Coleman and Ainsworth), printed in the supplement beginning at page 46, is reported at 431 F2d 417. The opinion of the United States Court of Appeals for the Fifth Circuit on rehearing en banc, dated March 23, 1972, printed in the supplement at page 73, is reported at 457 F.2d 815.

JURISDICTION

The opinion on rehearing en banc by the United States Court of Appeals for the Fifth Circuit was entered on March 23, 1972. A further timely petition for rehearing and rehearing en banc by McDermott was denied on May 12, 1972, and this petition for rehearing is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S. Code §1254 (1).

QUESTIONS PRESENTED

1. Whether defendants in a preferred maritime mortgage foreclosure action may, by the simple expedient of filing a diversity action for a declaratory judgment asserting an alleged failure of consideration, circumvent the exclusive admiralty jurisdiction granted by 46 U.S. Code §951 governing maritime mortgage foreclosures, as well as the exclusive admiralty jurisdiction provided in Rule 9(h), F.R.C.P., which was invoked by that party in the diversity action. Subsidiary to this question are:

(a) whether the decision of the District Court sitting in admiralty and fully supported by evidence is determinative of the issues, or whether in alleged improper jury instruction in the consolidated suit may require the reversal of the admiralty decision, and (b) whether on remand plaintiffs in the consolidated suit (defendants in the mortgage foreclosure suit) are entitled to trial by jury.

2. Whether the Court of Appeals, in reversing a judgment and remanding for a new trial, may preempt the District Court concerning contested issues of fact involving conflicting evidence, or whether the entire case should be left for further determination of facts in the District Court.

3. Where the District Court has permitted extensive testimony and other evidence to explain the meanings of terms in a contract, and where some of the terms are contradictory, may the Court of Appeals interpret the contract, or should the meaning of the contract be left to the trier of facts in the District Court. Is an instruction leaving this determination to the jury erroneous?

4. Whether the Court of Appeals may decline to consider the legal issue asserted by McDermott that the defendants have waived their defense of failure of consideration where this issue has been urged consistently in the trial court and before the Court of Appeals, and where the consideration of this issue could be determinative.

5. Whether the District Court may require plaintiff mortgage holder to account for alleged profits on resale

of vessels purchased at a marshal's sale of the vessels in admiralty, duly confirmed without objection of defendant vessel owners.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

On the question of exclusive admiralty jurisdiction:
46 U.S. Code §951

> "A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default of any term or condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

Federal Rules of Civil Procedure, Rule 9(h)

> "Admiralty and maritime claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. . . ."

Federal Rules of Civil Procedure, Rule 38(e)

> "Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

On the question of fact determination by the Court of Appeals:

United States Constitution, Amendment VII

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Federal Rules of Civil Procedure, Rule 52(a)

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

STATEMENT OF THE CASE

J. Ray McDermott & Co., Inc. (hereinafter "McDermott") brought an admiralty proceeding in the Eastern District of Texas pursuant to the United States Ship Mortgage Act to foreclose two preferred maritime mortgages securing a note in amount of $3,233,891.36 made by The Fish Meal Company and endorsed by Harvey W. Smith.[1] The eight mortgaged vessels were seized in Texas by the Marshal on April 4, 1968.[2]

---

[1] The original complaint is found at A. 1 (Appendix, page 1).
[2] The docket sheet in No. 5908 appears in front of the Appendix.

The Smith interests (Texas Menhaden Company, The Fish Meal Company and Harvey W. Smith) brought an action in the Eastern District of Louisiana designated as a "Complaint for Declaratory and Allied Relief, and for Damages for Breach of Contract".[3] The Smith interests alleged in the suit that there was diversity jurisdiction and alternatively that the claim was an admiralty and maritime claim pursuant to Rule 9(h), alleged that McDermott had breached a contract to construct the eight vessels and asked for damages as well as an injunction against the mortgage foreclosures and other relief. McDermott moved to dismiss this suit on the grounds that 46 U.S. Code 1951 granted exclusive jurisdiction in admiralty, and that the seizure of the eight vessels gave exclusive jurisdiction to the admiralty court in Texas.[4] The parties stipulated to the transfer of the Louisiana diversity case to the Eastern District of Texas, and to the interim sale of the vessels at public sale by the Marshal pending the outcome of the litigation.[5]

The eight vessels were sold by the United States Marshal at a public sale, and McDermott, being the last and highest bidder, purchased them for a lump sum of $689,000.00.[6] The sale was confirmed by the Court without opposition on October 18, 1968.[7] The District Court found that the sale was held "in accordance with the custom and practices of this Court, the provisions of the United States Ship Mortgage Act and applicable Statutes".[8]

The Smith interests requested trial by jury by motion

---

[3] This complaint begins at A. 56.
[4] Motion is at A. 105.
[5] The stipulation begins at A. 106.
[6] Motion to Confirm Sale is at A. 183.
[7] Order Confirming Sale, A. 199.
[8] Findings of Fact p. 4; A. 309.

which McDermott opposed on the ground that the admiralty jurisdiction was exclusive. The Court ordered consolidation of the cases for trial, a jury trial in the consolidated case and reserved decision to itself in the admiralty foreclosure.[9]

At the conclusion of the five day trial, the District Judge took the admiralty case under advisement, and submitted the consolidated case to the jury on special issues framed by the parties.

The jury found that McDermott had complied with its contract, and also found that Harvey W. Smith, President of The Fish Meal Company and Texas Menhaden Company, had knowledge of the alleged defects in the vessels when he acknowledged the indebtedness to McDermott in May, 1967, eleven months after the vessels had been accepted by the Smith interests.[10]

The District Court made findings of fact and conclusions of law recognizing the validity of McDermott's note and mortgages[11] and on June 26, 1969, entered judgment in favor of McDermott in the admiralty action.[12] Judgment was also entered dismissing the consolidated action and the claims made therein by the Smith interests.[13]

The judgment in the foreclosure action allowed recovery against The Fish Meal Company and Harvey W. Smith for the full amount of the note, including the

---

[9] Memorandum on behalf of the Smith interests is at A. 185; memorandum of McDermott is at R. 325 (Record p. 325) not being reproduced in the Appendix.

[10] Special interrogatories and answers appear at A. 293.

[11] The findings of fact are at A. 304.

[12] Judgment is at A. 311.

[13] Judgment in the declaratory action is at A. 315.

deficiency remaining after applying the proceeds of the sale, but ordered McDermott to account to the Smith interests for any profits made on a later resale of the vessels. The Smith interests appealed both judgments, while McDermott appealed solely from that portion of the judgment in the foreclosure action requiring it to account for profits on the resale of the vessels.

The Fifth Circuit entered its initial decision on September 15, 1970,[14] remanding both cases for a new trial because in its opinion the jury had not been properly instructed in the consolidated case, and holding that the Louisiana Deficiency Judgment statute operated to bar McDermott's right in the admiralty case to obtain a deficiency judgment over and above the amount from the sale of the vessels.

Rehearing En Banc was granted by the Fifth Circuit* and that portion of the first opinion relating to the deficiency judgment was reversed in an opinion announced on March 23, 1972. The remainder of the September 15, 1970 opinion was left undisturbed.

The basic contract for the construction of the vessels was in the form of a letter agreement which is set out in full beginning at page S-82 of the supplement to this petition.

The Fifth Circuit, in its opinion (S-53) stated: "It is at once apparent from the caption of McDermott's proposal that it agreed to build and the Smith interests expected

---

[14] This opinion is at S-46 (Supplement to this petition page 46).

* Amicus briefs supporting McDermott's position on the deficiency judgment were filed by First National City Bank, Avondale Shipyards, Inc., Zigler Shipyards, Inc., and by the United States, on behalf of the Maritime Administration.

to receive vessels suitable for menhaden fishing. It is equally apparent from pararaph 1 of the proposal that the applicable specifications were to be those prepared by McDermott".

After the initial proposal was made, but before it was signed, substantial changes were made to the contract and specifications. These were incorporated in Addendum No. 1 dated October 6, 1965.[15] The changes substantially altered the vessels to be built. McDermott contended that these changes amounted to an attempt to combine a menhaden fishing vessel with a deep sea trawler, and that this was an innovation. The Smith interests contended that these changes did not amount to any basic change in the contract.

McDermott contended in the trial court, and offered supporting evidence, that its responsibility under the contract was limited to construction of the hulls and basic structural components of the vessels; that the Smith interests were to be responsible for completing the vessels and, after McDermott installed Smith furnished engines and systems, to outfit them for fishing; that in connection with the latter, the Smith interests acknowledged that McDermott had no special expertise in the design and construction of completed fishing vessels and that they, the Smith interests, agreed to accept responsibility for the suitability of the vessels for fishing. The Smith interests contended to the contrary, and offered evidence in support of their contention.

Eleven months after execution of the note and mortgages defendants acknowledged their liability in writing.

---

[15] The addenda begin at A. -4, Exhibits Volume.

The jury, answering a special interrogatory, found that defendants had knowledge of the alleged defects in the vessels at the time the acknowledgement was made. McDermott contended that this constituted a waiver if any defects existed in that part of the work performed by McDermott. At the trial level, this contention was mooted by the findings of the judge and jury that McDermott had complied with the contract. The Court of Appeals reversed and remanded, but failed to consider McDermott's contention of waiver which was urged on appeal. McDermott again urged this contention to the court in its brief on rehearing en banc (there was no oral argument on rehearing), but the Fifth Circuit had failed to consider this question.

JURISDICTION OF THE COURT BELOW

In the District Court there were two consolidated cases. No. 5908, entitled "J. Ray McDermott & Co., Inc. v. The Vessels MORNING STAR, et al.,* etc., The Fish Meal Company and Harvey W. Smith", was a mortgage foreclosure action brought under the exclusive admiralty jurisdiction of the United States District Court found in 46 U.S. Code §951. Defendants cross-claimed, therein asserting, among other things, a breach of contract. No. 6056, entitled "The Fish Meal Company, Harvey W. Smith and Texas Menhaden Company v. J. Ray McDermott & Co., Inc.", is an action for a declaratory judgment and for damages, invoking both diversity jurisdiction and admiralty jurisdiction under Rule 9(h). It was first brought in the United States District Court for the Eastern

* The eight defendant vessels were MORNING STAR, DOUBLE-O-SEVEN, MUD LUMP, SHORELINE, OLD JOE, WATERMAN, PELICAN and GULF SHORE. Texas Menhaden Company intervened in the mortgage foreclosure action.

District of Louisiana, where it was Civil Action No. 68-685. This action was later transferred to the United States District Court for the Eastern District of Texas and consolidated with the first suit.

Admiralty jurisdiction in the mortgage foreclosure action is conceded.

REASONS FOR GRANTING WRITS

I.

The Admiralty Jurisdiction is Exclusive

The basic issue involved in these cases relates to the right of McDermott to foreclose its preferred maritime mortgages. The foreclosure was pursuant to 46 U.S. Code §951, which provides in part:

> "Upon the default of any term of condition of the mortgage, such lien may be enforced by the mortgagee by suit in rem in admiralty. Original jurisdiction of all such suits is granted to the district courts of the United States exclusively."

The consolidated suit denominated a "Complaint for Declaratory and Allied Relief, and for Damages for Breach of Contract" first invoked the diversity jurisdiction of the District Court and then designated the matter as an admiralty matter as follows:

> "Plaintiffs proceed for delaratory relief at law as to all issued thus cognizable; for damages for breach of contract; for an injunction against the exercise by McDERMOTT of certain remedies (allegedly in admiralty) which, on trial, will be shown to be non-existent; and alternatively, for declaratory relief; damages and allied relief in admiralty within the purview of Rule 9(h) and

> other Federal Rules of Civil Procedures applicable to actions in admiralty."[16]

It is submitted that both the exclusive grant of admiralty jurisdiction in 46 U.S. Code §951, and the designation of the complaint by the Smith interests as one in admiralty under Rule 9(h) places this dispute firmly within the exclusive admiralty jurisdiction of the court.

Federal Rule of Civil Procedure, Rule 38(e) makes it clear that cases designated to be in admiralty pursuant to Rule 9(h) continue to be exempt from jury trials:

> "Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)."

Since the consolidation of the admiralty rules with the civil rules in 1966, it has generally been held in the district courts that where relief could be demanded either on the civil side or on the admiralty side, that a designation of an admiralty claim under Rule 9(h), even in the alternative, results in designating the entire complaint as one in admiralty, where there is no right to a jury. This has been the holding in every reported case to consider the question since the unification of the civil and admiralty rules, all from the district courts.[17]

---

[16]Original Complaint in No. 6059, paragraph 2; A. p. 57.

[17] *Americana of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 337 F. Supp. 798, 1970 AMC 422 (P.R. 1969); *Sanderlin v. Old Dominion Stevedoring Corp.*, 281 F. Supp. 1015, 1968 AMC 664 (E.D. Va., 1968); *McCann v. Falgout Boat Co.*, 44 F. Rep. 34, *Cateora v. British Atlantic Assn. Ltd. of Nassau*, 282 F. Supp. 167; *Wells v. Scindia Steam Nav. Co. Ltd.*, 1971 AMC; *Cantey v. Flensburger Dampf. Shuldt & Co.*, 1971 AMC 2488 (E.D. N.C. 1971). See also *Banks v. Hanover S.S. Corp.*, 1968 AMC 1066. These cases must be distinguished from *Peace v. Fidalgo Islanti Packing Co.*, 419 F.2d 371 (9th Cir., 1969), *Hoskins v. Point Towing Company*, 395 F.2d 737 (3rd Cir., 1968), and *Gvistsman v. Western King Co., Inc.* (C.D. Calif., 1967), all of which allow a jury trial where a Death on the High Seas maritime claim is joined with a Jones Act death claim, the Jones Act including a statutory right to a jury. These cases are all progeny of *Fitzgerald v. United States Lines*, 374 U. S. 16, which holds that a jury is proper, "in the absence of some statutory or constitutional obstacle", 374 U.S. .....

In the instant case, the District Court consolidated the two actions for trial, reserving to itself the decision in the admiralty foreclosure action, and permitting the issues to go to the jury in the consolidated action.

The question of what effect the combining of the civil and admiralty rules has on the right to trial by jury, where both diversity and admiralty jurisdiction is involved, has never been settled by this Court. The decision of the Fifth Circuit in this case is contrary to that of the various district courts. Certiorari should be granted so that this question may be settled by this Court.

Further, the decision of the Fifth Circuit is contrary to the decision of this court in *Johnson v. United States Ship Bd. E. Fleet Corp.*, 280 U.S. 320. In that case this Court said:

> "Putting the United States and the Fleet Corporation on the same footing and providing remedies to be exclusive in admiralty would not serve substantially to establish uniformity if suits under the Tucker Act and in the court of claims be allowed against the United States and actions at law in state and federal courts be permitted against the Fleet Corporation or other agents for enforcement of the maritime causes of action covered by the act. Such a failure of purpose on the part of the Congress is not readily to be inferred. We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it." 280 U.S. 320 at 327.

The purpose of the exclusive grant in admiralty is to permit rapid determination of issues encompassed in the mortgage foreclosure action.

To permit the Smith interests to circumvent the exclusive grant of admiralty jurisdiction by the simple expedient of filing a diversity action for a declaratory judgment would be to defeat the congressional purpose in granting the exclusive jurisdiction.

Because this litigation belongs exclusively in admiralty, it necessarily follows that the judgment below should be examined on traditional standards of whether the judgment is substantially supported by the evidence. *McAllister v. U.S.*, 348 U.S. 19. As the Court of Appeals' opinion points out, there was divergent evidence on virtually every point of contention, and it is obvious that there was sufficient evidence to sustain the District Court's opinion under the test of *McAllister*.

If the court is nevertheless convinced that the District Court has misapprehended the obligations of the contract, and that the matter must be retried, it is submitted that the remand be with the directions that the trial be in admiralty without a jury.

II.

It is not the Function of the Court of Appeals to make Findings of Fact, which are the exclusive province of the Trial Court

The Seventh Amendment to the United States Constitution provides that no fact determined by a jury shall be reexamined by any court of appeal. Rule 52 of the Federal Rules of Civil Procedure provides that findings of fact by the trial judge shall not be set aside unless clearly erroneous and that due regard shall be had for the opportunity of the trial court in non-jury cases, to judge the credibility of witnesses. Despite these strictures, the Fifth Circuit in this case, while remandng it to the District

Court for a new trial because of an alleged erroneous jury instruction in the first trial has, nevertheless made certain statements which will be argued to be findings of fact binding on the trial court on remand. Each of these statements relates to a disputed factual question upon which there was conflicting evidence at the trial. These items are:

1. At page 9, the court states: "The Smith interests had no naval architect. McDermott agreed to design the boats".[18]

   To the contrary, Mr. Al Davies, General Manager for the Smith interests admitted that the Smith interests had on their payroll Mr. George Wagner, a full time marine architect, who examined the plans for the vessels and approved them. [19] Furthermore Mr. Harvey Smith consulted with Mr. Rudolph Matzer, a marine architect experienced in the design of Menhaden boats.[20] It was only after the review by Wagner and the consultation with Matzer that the Smith interests signed the contract.[21]

   McDermott provided substantial evidence that insofar as the suitability for fishing was concerned, it specifically disclaimed responsibility, and that this responsibility was assumed by Mr. Al Davies, General Manager of The Fish Meal Company, who negotiated the contracts.[22] Mr. Davies admitted virtually all of these claims by McDermott.[23]

---

[18] The original opinion of the Fifth Circuit is reproduced beginning at page 46 of the Supplement. The references are to the page numbers of the slip opinions, which are also reproduced.

[19] A. p. 683.

[20] A. p. 894, pp. 974-975.

[21] A. p. 973-977, p. 683.

[22] Testimony of V. J. LeBlanc, pp. 617, 621, 636; Francisco San Miguel, pp. 525, 920, 934.

[23] A. p. 670, 673.

2. At page 8 of the slip opinion, the court states: "It is at once apparent by the caption of McDermott's proposal that it agreed to build and the Smith interests expected to receive vessels suitable for menhaden fishing".[24]

   Nowhere in the contract does McDermott agree to build vessels warranted to be suitable for menhaden fishing, and there was considerable testimony that McDermott specifically disclaimed responsibility for the suitability of the vessels for menhaden fishing, and that the Smith interests undertook this responsibility.[25]

3. At page 9, the court states: "The weight of these various appurtenances including the concrete in the holds accounted for a nine inch increase in the draft of the vessels".[26]

   This assertion ignores the fact that there was evidence by Mr. Nickum, expert witness presented by McDermott, that the nine inch increase in draft was attributed to the addition of the cement alone, which McDermott warned against.[27]

   In addition, the actions of the Smith interests resulted in further increases in draft as follows:

   a. Added weight of nets, fish pumps, etc.

      Added Depth[28] ..... 3 inches

   b. Excess chill water carried in holds because of inoperative equipment furnished by the Smith interests.[29]

---

[24] Supplement, p. 53.
[25] A. pp. 633-636, 920, 934.
[26] Supplement p. 54.
[27] A. p. 982, Plaintiff's Exhibit #25.
[28] A. p. p. 804.
[29] A. pp. 991-992. Captain Fortner testified that six to eight feet of chill water was carried—enough to increase draft by four to six feet. A. p. 715.

Added Depth ..... 12 inches

c. Excess fuel not needed, but shown in calculations of Mr. Sargent.[30]
Added Depth ..... 8 inches

4. At page 9, the court states that "The Vessel captains further testified that the boats were 'out of trim' and suffered from a 'quick roll' which rendered the raising and lowering of the purse boats and the loading of the fish dangerous to the crews.[31]

There was no evidence of any 'quick roll' presented by any of the captains. The danger in lowering the purse boats was the result of the stern ramp and high stern added by the Mr. Smith.[32]

5. At page 18, the court states: "The boat was too flat-bottomed".[33]

It may be that the court was simply paraphrasing the testimony of Captain Fortner but there was substantial disputed testimony as to whether or not the vessels were flat-bottomed or v-bottomed, as called for in the contract.[34]

6. At page 20, the court stated: "there is testimony that San Miguel issued no warning that these changes would interfere with the efficiency or seaworthiness of the vessels".[35]

However, the court neglects to point out that there was substantial testimony as well as written evidence that San Miguel did warn the Smiths

[30] A. p. 811.
[31] Supplement, page 54.
[32] A. pp. 717-718, 746.
[33] Supplement, page 63.
[34] Plaintiff's Exhibits Nos. 12 and 13 are scale models of the vessels, which show the bottoms.
[35] Supplement, page 65.

> of the possibility of adverse effects from these changes, and that these warnings were ignored by the Smith interests.[36]

This Court has stated the rule: "The appellate court cannot make a determination of fact reserved to the jury". *Securities & Ex. Com. v. Chenery Corp.*, 319 U.S. 80 at 88.

It is submitted that the circuit courts making these statements, which will be argued to be findings of fact, is improper and contrary to the rules established by the Seventh Amendment and Rule 52. If this matter is properly to be tried by the jury or by the judge on remand, it should be under instructions that these factual matters be left open for determination by the triers of facts at the District Court level.

III.

WHERE EVIDENCE HAS BEEN ADMITTED TO EXPLAIN THE MEANING OF THE TERMS OF A CONTRACT. THE QUESTION OF INTERPRETATION OF THE CONTRACT IS FOR THE TRIER OF FACTS.

The Court of Appeals in dealing with the breach of contract issue states "It is undisputed that these parties had a written contract. The contract proposal recited that McDermott prepared the plans and specifications. The contract therefore is entitled to a strict construction against McDermott. Unambiguous contracts cannot be destroyed by ambiguous circumstances." "We see nothing ambiguous about the terms of this contract."[37]

The Court cites Louisiana cases as authority for each of its statements, yet it is clear that in federal courts,

[36] A. pp. 932, 939; Plaintiff's Exhibits Nos. 19 and 25.
[37] Supplement, pp. 64 & 65.

even in a diversity case, federal rules of interpretation and construction of contracts apply, not state rules. *Byrd v. Blue Ridge Rural Electric Corp.*, 356 U.S. 525, 2 L.Ed. 2d 953.

At the trial each side submitted substantial evidence relating to the background situation at the time the contracts were executed. Each party objected to the admission of evidence to vary the terms of the contract, but in each case the court permitted the introduction of this evidence.

While it is true that an unambiguous contract is to be interpreted by the court, and that the interpretation of contracts in federal courts is considered to be a matter of law* it is also true that in federal courts, as in Louisiana, the objective of interpretation of contracts is to find the true intent of the parties. With this in mind the courts, particularly in complex business affairs, must look to the surrounding circumstances to determine the meaning of the contracts.

The Court charged the jury that McDermott had the burden of proving that it had complied with its contract.** The Court further charged that if McDermott had breached the contract in any of the following items that was all that was necessary to amount to a material breach of the contract. These items were:

1. Drafts grossly beyond the specified drafts which made the vessels unable to fish or compete with other vessels in the shallow Gulf Waters, for which the contract specified they were to have been built;

---

* In Louisiana interpretation of contracts is a question of fact—*Shell Oil Co. v. Texas Gas Transmission Corp.*, 176 So.2d 692 (La. App. 1964).

** McDermott carried this burden of proof even though it should have been on the Smith interests who had alleged breach of contract.

2. Inability to lower and raise the purse boats properly, to tow them and turn without capsizing them while towing, jeopardizing the boat and crew;

3. A quick roll unsuitable for a fishing boat;

4. Inability to load the fish without going down by the head excessively, far over the specified draft when fully loaded and complete uselessness of at least one-third of the hold space.

5. Overall poor structure (construction) resulting in the bursting of pipes as the hulls worked in even moderate seas, and unseaworthiness;

6. Inability of the crew to work on and off the vessels in getting in and out of the purse boats and in handling the nets.

7. Breach of manufacturer's warranties of suitability for all intended purposes implied in law as well as specified in the contract.

8. Flat rather than true V-bottom as contracted for, causing trouble in shallow water, damaging nets and catching."

The Court further stated that "this is a matter of contract, and a fact determination by you, as to whether or not there was any material variance in the construction of these vessels".[38]

During his argument to the jury Mr. Peragine, attorney for Fish Meal, stated that as a matter of law the contract

[38] A. p. 1068.

contained an implied warranty that the vessels would be suitable for menhaden fishing.[39]

There is no warranty of suitability in a construction contract under Louisiana law. *Draube v. Rieth,* 114 So.2d 879

The Court corrected this erroneous statement of the law by charging:

> "The Court would instruct further that the fact that the vessels did not prove suitable for fishing would not indicate that the vessels were not constructed in accordance with the contract because the very conception of the vessels was an innovation and, it was thought no doubt with good faith on the part of both parties that this type of vessel would prove suitable and desirable for fishing.
>
> "Now, the fact that when stating the fact that it proved—if you find that they were not suitable for fishing—that in itself does not mean that the contract was breached and that the vessels were not constructed in accordance with the terms of the contract."[40]

The Court was reiterating its earlier charge that the jury was to decide whether or not McDermott had represented or warranted that the vessels would be suitable for fishing, and that the jury had two questions to decide; first, was there an implied warranty, and second, if such a warranty existed, had it been breached? The Court was correcting the erroneous statement of law made by counsel for Fish Meal in arguing that the jury need find only that the vessels were unsuitable for fishing in order to find for Fish Meal.

---

[39] A. pp. 1030, 1042.
[40] A. pp. 1069, 1070.

The District Court determined that it was proper to submit to the jury the question of what warranties, if any, were included in the contract. The Court was correct in submitting this question of interpretation of the contract to the jury because:

(a) There were ambiguities in the contract;

(b) Even if the contract were not ambiguous to fully understand its provisions, it is necessary to know the surrounding circumstances and the situation in which the parties were placed at the time of the making of the agreement in order to determine the intent of the parties; and

(c) There is no express warranty in the contract.

The ambiguities are:

1. The letter listing the contract price and forwarding the plans and specifications was captained "menhaden fishing vessels".[41] The Circuit Court held that by including the term "menhaden fishing vessel", there was a warranty of suitability made in the contract. The specifications called for a vessel suitable for "pursuing and trawling in the Gulf of Mexico".[42] Pursing involves the use of small boats which encircle a school of fish with a large net, after which the mother ship comes along side and handles the nets over the side. There is testimony that this requires a low deck.[43] Trawling involves towing a net astern of the vessel, and requires a raised deck. Pursing requires the location of fish handling equipment amid-

[41] Plaintiff's Exhibit No. 1, Appendix, Exhibit Volume, page 1.
[42] Plaintiff's Exhibit No. 1, Appendix, Exhibit Volume, page 54.
[43] The Smith interests went so far as to show a movie, some 20 minutes in length, purporting to show typical menhaden operations, presumably to explain what was meant by "Menhaden Fishing Vessel". This was shown to the jury, A. 591.

ships; trawling requires that the amidships deck area be cleared.[44] These terms are mutually exclusive and present an ambiguity in the contract.

2. The Circuit Court accepts plaintiff's contention that the term "menhaden fishing vessel" imports ability to maneuver in shallow water as one of its prime requisites, but the contract, as amended, for dual purpose vessels, makes no such requirement and sets up the prime requisites for these vessels of speed, in deep unrestricted waters, and cargo carrying capacity. This ambiguity requires clarification outside the contract.

There is no warranty of suitability contained in the contract. If there was any warranty, it was found either in implied facts or in some separate unwritten contract to design, and the existence of such a warranty was properly a question for the determination of the trier of facts. The District Court submitted a special issue of whether or not McDermott complied with the contract, plans and specifications, as amended. Under the instructions to the jury, the District Judge left it to the jury to decide whether or not McDermott breached a warranty of suitability, and implicit in this was the necessity for a finding by the jury as to whether or not there was a separate warranty. The Smith interests did not object to the special issues submitted, nor did they request any additional issues to be submitted to the jury. The verdict of the jury that McDermott complied with its contract as well as the findings of fact by the District Court were resolutions of these facts in favor of McDermott, and the Circuit Court cannot substitute its own opinion for findings of the trial judge and jury.

---

[44] A. pp. 754, 929-932.

Various cases have considered the extent to which extrinsic evidence must be considered in determining the meaning of contracts:

> "But in considering the contract, we cannot interpret it, or determine its true meaning in a vaccum with complete disregard of pertinent facts and surrounding circumstances out of which this litigation arose.
>
> * * *
>
> "In reaching our decision in this case we are within the bounds of sound legal principles and fundamental rules of contract construction if we look not only to the actual wording of the contract, but also give consideration of its subject matter, the facts relating to the controversy in issue and the surrounding circumstances, in order to determine the intention of the parties as reflected by the words used. *Gulf, C.&S.F. Ry. Co. v. Coca-Cola Bottling Co. of Cleburne*, 363 F.2d 465 at 467. (5th Cir.).
>
> "Under basic principles of contract construction, the meaning and application of plain words used is to be judged in the situation in which the parties were placed at the time of making the agreement
>
> * * *
>
> "It was their needs, their setting, their words in that setting from which the law draws meaning. *Motor Vehicle Casualty Company v. Atlantic National Inc. Co.*, 374 F2d 601 at 606 (5th Cir.)
>
> ". . . in determining what this setting is the Court may receive for that limited purpose correspondence showing the dealings between the

> parties, the negotiations and the like, not to alter or vary the terms of the written memorial but to portray the setting." *Hohenstein v. S.M.H. Trading Co.*, 382 F.2d 530 at 532 (5th Cir.).

The Second Circuit Court of Appeals, Judge Friendly, considered whether a question of the meaning of the contract should be submitted to the jury in *Meyers v. Selznick Company*, 373 F.2d 218, and reviewed the jurisprudence in this area:

> "With the courts' growing appreciation of Professor Corbin's lesson that words are seldom so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation, see 3 Corbin on Contracts § 542, the exception bids fair largely to swallow the supposed general rule. About all that is left of the latter, at least where parol evidence has been properly admitted, is that, save for contracts so technical or complex as to lie beyond a jury's comprehension, 'if the meaning after taking the parol evidence, if any, into account is so clear that no reasonable man could reach more than one conclusion as to the meaning of the writing under the circumstances', 4 Williston, supra, §616 at 661-62 the court will instruct the jury as to the proper interpretation in the light of its findings with respect to the parol evidence or, where the parol evidence is undisputed, will direct a verdict—just as it would do on any other question where the evidence would warrant only one result."

Where the existence and terms of a contract must be determined by drawing inferences of fact from all of the pertinent circumstances, and if the possible inferences are conflicting, the choice is for the jury. *Osborne v Boeing Airplane Company*, 309 F.2d 99; *United States v. Taylor*, 293, F2d 717.

It is not error to submit to a jury the question of the meaning of a contract where the contract contains contradictory provisions, where the factual background to and the subject matter of the contract is complex, and where extensive evidence has been submitted to the jury. The Fifth Circuit opinion, holding that it was error to submit this question to the jury, is both in error and in conflict with other opinions of the Fifth Circuit and opinions of other circuits. Writs should be granted to correct this plain error and to settle this conflict.

IV.
THE SMITH INTERESTS HAVE WAIVED THE RIGHT TO CLAIM BREACH OF CONTRACT; THE FIFTH CIRCUIT ERRED IN FAILING TO RULE ON THIS QUESTION.

McDermott has consistently urged in the District Court and in the Court of Appeals that any right which the Smith interests may have had to object to the alleged failure of consideration under the note and mortgages was waived when Mr. Harvey W. Smith acknowledged in writing that the indebtedness of The Fish Meal Company was due. The jury found that Harvey Smith, who was president of both The Fish Meal Company and Texas Menhaden Company, had full knowledge of the alleged defects at the time he made this acknowledgement. While this issue became moot in the District Court because of the overall finding that there was no breach of contract by McDermott, it is no longer moot in light of the panel opinion upsetting the findings by the jury and the District Judge. The determination of this issue may foreclose the necessity for further litigation.

By thrice failing to rule on the issue of waiver, squarely presented to it at the original hearing and on two applica-

tions for rehearing, the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings that writ of certiorari should be granted to prevent substantial injustice.

Under date of April 21, 1967, The Fish Meal Company, in a letter signed by Mrs. C. M. Ballard at the express direction of Harvey W. Smith, President, after listing the note of October 28, 1966 in the amount of $3,233,891.36, stated:

CONFIRMATION

Mattison and Riquelmy:

The above is a correct statement of all notes owed by us to J. Ray McDermott & Co., Inc. at March 31, 1967, except as noted below.

THE FISH MEAL COMPANY

By /s/ Mrs. C. M. Ballard
Per Mr. Harvey W. Smith"

There were no notations or exceptions listed.[45]

The Smith interests claim that there was a lack or failure of consideration in that the boats were allegedly unable to perform satisfactorily. Lack of consideration would be involved had the note been given for absolutely no consideration. Here vessels which cost in excess of $3,000,000.-00, no part of which has been paid or advaned by the Smith interests, were delivered to the Smith interests, accepted and put to work. The vessels harvested substantial quantities of fish. There was evidence that any

[45] Plaintiff's Exhibit No. 11.

problems with the vessels related to malfunctionnig equipment which was all furnished by the Smith interests. Certainly there has been at least a substantial consideration.

There is federal law which fixes the rights of parties asserting federal rights. *Clearfield Trust Co. v. U.S.*, 318 U.S. 363; *Deitrick v. Greaney*, 309 U.S. 190.

The law has long been settled in all states as well as under the federal law of negotiable instruments that an acknowledgment of an indebtedness or a new promise to pay made after knowledge of the facts relating to the alleged failure of consideration amounts to a waiver of the defense of failure of consideration. *Fitzpatrick v. Flannagan*, 106 U.S. 648; *Anderson v. Tway*, (6th Cir.) 143 F.2d 95, 102; *E. H. Taylor, Jr. & Sons v. First Nat. Bank, (6th Cir.)* 212 Fed. 898; *DeBuys v. Mollere*, 3 Mart. (N.S.) 318 (S.C. La.); *Helm v. Ducayet*, 20 La. Ann. 417; *Gulotta v. Swinney*, 143 So.2d 775 (La. App.); *Lober v. Tooley*, 47 Cal. App. 2d 47, 117 p.2d 421; *Eaton v. Laurel Delicatessen Corp.*, 173 N.Y.S.2d 868, affirmed 185 N.Y.S.2d 551; *Hurtig v. Jones*, 200 Kan. 89, 434 p.2d 1009; *Calvin Watson Motor Sales v. De vaull*, 51 Ill. App. 2d 125, 201 N.E.2d 1. See also *Magma Extension Mining Co. v. Kinard*, 106 F. Supp. 362, 365, affirmed 198 F.2d 267. This is different from the law relating to lack of consideration, which is a defense which in some jurisdictions may not be waived. *First Nat. Bank v. Smith.* 132 Pa. Super. 73, 200 Atl. 215.

If the vessels subsequently were found not to be completely satisfactory to the Smith interests, this would amount, at most, to a partial failure of consideration.

First Nat. Bank v. Smith, 132 Pa. Super. 73, 200 Atl. 215.

The Smith interests having confirmed the indebtedness have waived the defenses of failure of consideration on which their claims are based.

V.
A MORTGAGEE IS ENTITLED TO BID IN PROPERTY AT A JUDICIAL SALE ON FORECLOSURE OF A MORTGAGE WITHOUT BEING REQUIRED TO ACCOUNT FOR ANY PROFITS ON A RESALE OF THE PROPERTY.

The District Court in awarding the deficiency judgment to McDermott has required that McDermott account for any profits which it may make on resale of the vessels. McDermott appealed to the Circuit Court that portion of the judgment. Because the judgment was vacated, the Circuit Court did not reach McDermott's appeal.

It has long been settled that a judicial sale, once confirmed, may be set aside only on a showing of fraud and inadequacy of price. *Pewabic Mining Co. v. Mason*, 145 U.S. 349. Mere inadequacy of price standing alone is not sufficient to set aside such sale. *Lambert's Point Towboat Co. v. United States*, 182 Fed. 388 (4th Cir.). See also *Ballentyne v. Smith*, 205 U.S. 285; *Graffam v. Burgess*, 117 U.S. 180.

While there is some authority to the effect that a mortgagee in possession or, in analogous circumstances, a pledgee in possession may not become the purchaser of mortgaged property, this rule does not apply where the mortgagee is granted authority to acquire such property in the instrument. *Easton v. German-American Bank*, 129 U.S. 532, and, in any event, does not apply where the

mortgaged property is sold at a judicial sale as in the present case.

In *Pewabic Mining Co. v. Mason*, 145 U.S. 349, Justice Brewer considered these possibilities and held that there was no prohibition against the mortgagee and/or plaintiff acquiring the property at a judicial sale:

> "Nor is this a case where the complainants stood in any such fiduciary relations as forbade them to purchase or prevented even their acting for others in bidding. They had litigated with the defendant for years in establishing the right to have the property sold; and when finally they have succeeded in getting a decree that it be sold, they did not then assume a duty to the defendant and become incapacitated from bidding freely for themselves or for others. None of those matters of a fiduciary character, which sometimes enter into and avoid sales, existed in this case." 145 U.S. 349, 362.

In any event the joint stipulation for sale of the vessels provided that either the Smith interests or McDermott could bid the vessels in at the proposed judicial sale (A. 109).

It is settled law, probably protected by constitutional guarantees, that a mortgagee is under no incapacity to take at a judicial sale and may bid and acquire just as any stranger may do. *Wright v. Mountain Trust Bank*, 300 U.S. 440 at 459.

If the Smith interests thought that the price was inadequate or that McDermott should not have bid, they should have opposed confirmation of the sale, and their failure to do so estop them from questioning McDermott's

absolutely proprietary interest in the vessels acquired at the judicial sale of this time. *Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587; *Starkweather v. Jenner*, 216 U.S. 524.

The District Court, commenting on that portion of the judgment which is the subject of McDermott's appeal, stated "I recognize that this is probably a hybrid or no basis at all for the Court to make such an observation . . .".[46] The District Court's comment is correct in that there is no precedent or authority for such provision under the facts of this case as found by both the District Court and the jury.

The problems and complexities created by including an accounting provision in a judgment in a mortgage foreclosure case are self-evident. For example, in the event of a decline in market, the mortgagee who purchases a vessel stands all the risk of loss and bears all expense from the time the vessel is acquired to the time of resale. The judgment debtor, by not bidding at the judicial sale, assumes no risk and bears no expense but enjoys the benefit of whatever profits may result from a resale.

It is axiomatic that a judgment debtor may bid at the judicial sale had he so chosen. If this precedent is allowed to stand, the mortgagor can shift all risk of loss and expense to the mortgagee simply by refraining from bidding against the mortgagee who often must bid in order to protect his interest in the vessel. The portion of the judgment pertinent hereto relieves the mortgagor of any requirement to oppose confirmation of the sale and permits the mortgagor to await the outcome of litigation concerning a mortgage on which the mortgagor has de-

[46] A. p. 1103.

faulted. Granting a mortgagor in default such an option is untenable. *Starkweather v. Jenner*, 216 U.S. 524.

The mortgagor in default could, additionally, place the judgment creditor in an impossible situation. To itemize but a few examples, if a vessel is not resold, the judgment debtor could claim that it is being deprived of profits which would have been made had the vessel been sold; if a vessel is sold, multiple questions could be raised as to whether the price was the best obtainable at the time and place of sale; the time and place of sale could be challenged as not being productive of the best price; if the judgment creditory expends substantial amounts of money to maintain a vessel in excellent condition, the debtor could object that such expenditures were excessive; if the expenditures are not made, then the failure to make such expenditures might also be challenged as the reason for a disappointing sale price.

The Ship Mortgage Act implements the public policy, declared by Congress, of encouraging investment in ship mortgages. *Detroit Trust Company v. Steamer "Thomas Barlum"*, 273 U.S. 21.

The portion of the judgment requiring an accounting by McDermott, as purchaser of the vessels, for any possible profits on any future sale of the vessels is without basis in low or in the record and is likely to lead to further litigation. The effect on the maritime industry, if mortgagees are discouraged from bidding at foreclosure sales, will be disruptive and could defeat the very purpose of the United States Ship Mortgage Act which is to encourage investment in the maritime industry of the United States. This portion of the judgment must be reversed.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that its petition for a writ of certiorari be granted. July 31, 1972.

Respectfully submitted,

DAVE McNEILL, JR.
ROBERT M. JULIAN
KENNEDY J. GILLY
NEAL D. HOBSON
Counsel for Petitioner

CERTIFICATE

The undersigned hereby certifies that copies of the foregoing Petition for Certiorari have been served on respondents by mailing copies thereof to Frank J. Peragine, Deutsch, Kerrigan & Stiles, 1800 Hibernia Bank Building, New Orleans 70112 and Bryan J. McGinnis, Mehaffy, Weber, Keith & Gonsoulin, San Jacinto Building, Beaumont, Texas, attorneys for respondents, postage prepaid, properly addressed as indicated herein on the 31st day of July, 1972.

CIVIL ACTION NUMBER 5908.

(Heading Omitted.)

JUDGMENT.

The above captioned cause having been consolidated for trial with Civil Action No. 6056, THE FISH MEAL COMPANY, TEXAS MENHADEN COMPANY and HARVEY W. SMITH v. J. RAY McDERMOTT & CO., INC., which action was transferred from the Eastern District of Louisiana, New Orleans Division, and said cause having come on for trial March 3, 1969, and all parties having announced "ready", and plaintiff having appeared by Dave McNeill, Jr., and Robert M. Julian of Vinson, Elkins, Searls & Connally, and by Neal D. Hobson of Milling, Saal, Saunders, Benson & Woodward, and defendants having appeared by Bryan J. McGinnis of Mehaffy, Weber, Keith and Gonsoulin and by Frank J. Peragine and William S. Stone of Deutsch, Kerrigan & Stiles; and the case having been tried on March 3, 4, 5, 6 and 7, 1969, before the Court and upon conclusion of all testimony and proofs and the respective parties having rested, the companion case Civil Action No. 6056 was submitted on March 7, 1969, to the jury upon certain Special Interrogatories, and the jury having returned a verdict in favor of J. Ray McDermott & Co., Inc., and the Fish Meal Company, Texas Menhaden Company and Harvey W. Smith having moved on May 29, 1969, for an order setting aside the jury's verdict and for a new trial in said companion case (Civil Action No. 6056) and having moved for summary judgment in this case denying a deficiency judgment in this case and said motions having been duly argued by counsel and considered by the Court, and said motions having been denied on May 29, 1969, now it is

ORDERED, ADJUDGED and DECREED that the plaintiff should have, and hereby is granted, judgment recognizing the validity of the note of the Fish Meal Company, which it holds in the amount of $3,233,891.36, and further recognizing the validity of those two certain preferred maritime mortgages securing the said note, and covering the vessels MORNING STAR, DOUBLE-O-SEVEN, MUD LUMP, SHORELINE, OLD JOE, WATERMAN, PELICAN and GULF SHORE, their engines, tackle, appurtenances, etc.; and it is

FURTHER ORDERED, ADJUDGED and DECREED that plaintiff J. RAY McDERMOTT & CO., INC. recover of and from The Fish Meal Company and Harvey W. Smith the amount of $3,233,891.36, together with interest thereon, at the rate of six per cent (6%) per annum from August 9, 1966, until paid, for ten per cent (10%) of such amount of principal and interest as attorney's fees, and for all costs of Court in these proceedings and for all costs of the United States Marshal in connection with the seizure and sale of the vessels herein; and it is

FURTHER ORDERED ADJUDGED and DECREED that a writ of execution shall issue to recover said amount of and from The Fish Meal Company, Harvey W. Smith and United States Fidelity and Guaranty Company, surety, to the extent of its liability; and it is

FURTHER ORDERED, ADJUDGED and DECREED that the bond of J. Ray McDermott & Co., Inc., The Travelers Indemnity Company, surety, in the amount of $666,747.25 representing the purchase price of said vessels at the foreclosure sale held on October 11, 1968, less costs of sale,

be cancelled and discharged of record, and that such amount be credited against the amount of the judgment rendered herein; and it is

FURTHER ORDERED, ADJUDGED and DEGREED that the cross-claims of The Fish Meal Company and Harvey W. Smith and the Intervention of Texas Menhaden Company shall be and are hereby dismissed, with costs; and it is

FURTHER ORDERED, ADJUDGED and DECREED, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, that there is no just reason for delay concerning the foregoing, which are final and appealable; and it is

FURTHER ORDERED, ADJUDGED and DECREED that any profits realized by J. Ray McDermott & Co., Inc., from such sales of the vessels shall be applied as an offset against any remaining unsatisfied amount due to J. Ray McDermott & Co., Inc., hereunder, or, in the event the judgment herein be satisfied, then such profits shall be refunded by J. Ray McDermott & Co., Inc., to the Fish Meal Company and Harvey W. Smith, the accounting for such sales being subject to the approval of this Court, for which purpose only the Court retains jurisdiction.

Dated and entered at Beaumont, Texas, this 26th day of June, A.D. 1969.

(S.) JOE J. FISHER
Chief Judge
United States District Court
Eastern District of Texas

CIVIL ACTION NUMBER 5908.

(Heading Omitted.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

J. Ray McDermott & Co., Inc. (McDermott) filed a complaint in admiralty against the vessels MORNING STAR and seven others, *in rem*, to foreclose two mortgages granted by their owner, The Fish Meal Company (Fish Meal), pursuant to the United States Ship Mortgage Act, Title 46, U.S.C. 911, et seq. The mortgages were granted to secure Fish Meal's note dated October 28, 1966, in the principal amount of $3,233,891.36, payment of which was guaranteed by Harvey W. Smith (Smith), a shareholder in and President of Fish Meal.

The action also seeks deficiency judgments against Fish Meal and Smith for the difference between the amount due on the note and the net proceeds presently held in the registry of the court following sale of the vessels.

Consolidated for trial with this case was an action filed by Fish Meal, Texas Menhaden Company (Texas Menhaden) and Smith against McDermott in the Eastern District of Louisiana, New Orleans Division, (No. 68-685), which was brought on the civil side of that court and which sought a declaratory judgment invalidating the note for alleged absence and/or failure of consideration and seeking, among other things, damages for alleged breach of contract for constructing the vessels in question. The action was transferred from New Orleans to Beaumont, following which Fish Meal, Texas Menhaden and Smith renewed a motion

for a jury trial. This Court granted the motion to have the transferred case tried before a jury.

Fish Meal and Smith filed a cross or counter-claim in McDermott's admiralty foreclosure action in which they made the same allegations as in the transferred civil action, and Texas Menhaden filed an intervention in the foreclosure action claiming, among other things, damages for alleged breach of its construction contract with McDermott.

The cases were tried on March 3, 4, 5, 6 and 7, 1969, with the transferred civil action being tried before a jury.

At the conclusion of testimony and proof, and the respective parties having rested, the case was submitted on March 7, 1969, to the jury upon special issues.

The jury returned a verdict in favor of McDermott, finding that McDermott constructed the vessels in accordance with its contract as amended.

In connection with this admiralty foreclosure action, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

1. Negotiations between the parties ultimately terminated in a written contract requiring McDermott to construct for Texas Menhaden eight (8) fishing vessels in accordance with the terms and conditions of a letter agreement dated September 25, 1965, and the specifications and

drawings incorporated therein which were approved by representatives of Texas Menhaden, and various amendments thereto agreed upon by the parties.

2. The Court agrees with the jury's finding that the vessels were constructed in accordance with McDermott's contract as amended and so holds.

3. The contract between McDermott and Texas Menhaden provided that McDermott's portion of the construction of the vessels would be financed entirely by McDermott and that at the completion of McDermott's work a note would be given to cover such work, such note to be secured by mortgage liens upon said vessels.

4. At the request of Texas Menhaden, McDermott conveyed title to the vessels to The Fish Meal Company. The Fish Meal Company executed and delivered to McDermott a note in the principal amount of $3,233,891.36 dated October 28, 1966, and on the same date executed and delivered two mortgages securing the note. The note was payable in three annual installments, the first of which was due on August 9, 1967. Fish Meal did not pay the first or any other installment and has been continuously in default since August 9, 1967.

5. The Court finds that the mortgages are valid preferred mortgages under the United States Ship Mortgage Act.

6. Execution and delivery of the note in the amount of $3,233,891.36 dated October 28, 1966, has not been contraverted.

7. By letter bearing date of April 21, 1967 (Exhibit 11) and forwarded to McDermott's auditors, Mattison and Riquelmy, after Fish Meal and Smith had knowledge of the alleged deficiencies of which they now complain, Fish Meal, at the direction of Smith, acknowledged the note as being due and owing. The jury so found in the civil action and this Court agrees.

8. The Court finds that there was no failure of consideration and that The Fish Meal Company is indebted to J. Ray McDermott & Co., Inc. in accordance with the terms and conditions of said note, and that Harvey W. Smith is liable to J. Ray McDermott & Co., Inc. upon his endorsement and guarantee that the note would be paid.

9. After delivery of its note secured by valid mortgages, The Fish Meal Company caused or permitted its employees to remove certain pumps, machinery and equipment from various vessels, which was in violation of the terms and conditions of the mortgages.

10. The Court ordered that the removed equipment be made available to be sold with the vessels at the Marshal's sale but, in lieu thereof, the defendants posted bond in the amount of $150,000.00.

11. The vessels were seized by the United States Marshal under process duly issued by the Court and pursuant to Court order agreed to by Fish Meal, Texas Menhaden and Smith, were sold in accordance with the custom and practices of this Court, the provisions of the United States Ship Mortgage Act and applicable statutes.

12. Plaintiff J. Ray McDermott & Co., Inc. is entitled to a deficiency judgment against The Fish Meal Company and Harvey W. Smith to the extent that the amounts due in accordance with the note will not be satisfied by the net proceeds of the Marshal's sale of the vessels, which latter amount has been paid into and is presently held in the registry of the Court. Further, plaintiff J. Ray McDermott & Co., Inc. is to refund defendants any profit realized from the proceeds received by J. Ray McDermott & Co., Inc. in the sale of the vessels made with the approval of the Court.

CONCLUSIONS OF LAW.

1. This Court has jurisdiction pursuant to 46 U.S.C. 951, 954.

2. Plaintiff J. Ray McDermott & Co., Inc. holds valid mortgages pursuant to the United States Ship Mortgage Act upon the eight vessels involved in this litigation which were executed by The Fish Meal Company as owner of the vessels to secure the payment of its note in the amount of $3,233,891.36, which amount is due and payable to plaintiff, together with interest and attorneys' fees as provided in said note. However, defendants are entitled to be refunded any profit realized by J. Ray McDermott & Co., Inc. on the future sale of the vessels, which sales are subject to the prior approval and orders of the Court.

3. Plaintiff is entitled to foreclose the mortgage and its request for that relief should be in all respects granted and the mortgages should be foreclosed.

4. Plaintiff's request for a deficiency judgment against The Fish Meal Company and against Harvey W. Smith to the extent that the net proceeds presently held in the registry of the court are insufficient to satisfy the amount due to plaintiff under the terms and conditions of The Fish Meal Company's note, which note was endorsed and payment thereof guaranteed by Harvey W. Smith.

5. Plaintiff is entitled to require The Fish Meal Company, Harvey W. Smith and Texas Menhaden Company to pay into the registry of the court the cash amount of One Hundred Fifty Thousand Dollars ($150,000.00) representing the amount of bond which said defendants elected to post in lieu of complying with an order to return to the vessels the pumps, machinery and equipment which had previously been removed from the mortgaged vessels in violation of the terms of the mortgages and which, unless returned, would not be available at the Marshal's sale; otherwise, plaintiff may proceed against the surety on said bond.

6. There is no just reason for delay in executing on the basic judgment of foreclosure, and accordingly it is directed that judgment be entered against the Fish Meal Company and Harvey Smith in accordance with the foregoing.

ENTERED this 26th day of June, A.D. 1969.

(S.) JOE J. FISHER
United States District Judge

CIVIL ACTION NUMBER 6056.

(Heading Omitted.)

JUDGMENT.

The above captioned cause having been consolidated for trial with Civil Action No. 5908, J. Ray McDermott & Co., Inc. v. The vessels MORNING STAR, et al, *in rem*, and The Fish Meal Company and Harvey W. Smith, *in personam*, and said causes having been reached for trial on March 3, 1969, and all parties having announced "ready", and plaintiffs having appeared by Bryan J. McGinnis of Mehaffy, Weber, Keith & Gonsoulin, and by Frank J. Peragine and William S. Stone of Deutsch, Kerrigan & Stiles, and defendant having appeared by Dave McNeill, Jr. and Robert M. Julian of Vinson, Elkins, Searls & Connally, and by Neal D. Hobson of Milling, Saal, Saunders, Benson & Woodward; and

The case having been tried on March 3, 4, 5, 6, and 7, 1969 before the Court and a jury and, upon conclusion of all testimony and proofs and the respective parties having rested, the case was submitted on March 7, 1969, to the jury upon certain Special Interrogatories, and the jury having returnd a verdict in favor of J. RAY McDERMOTT & CO., INC.,

NOW, upon motion of defendant, J. Ray McDermott & Co., Inc., it is

ORDERED, ADJUDGED and DECREED that the complaint herein shall be and hereby is dismissed, with costs to be paid by plaintiffs.

Dated and entered at Beaumont, this 26th day of June, 1969.

(S.) JOE J. FISHER
Chief Judge
United States District Court
Eastern District of Texas

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28496

J. RAY McDERMOTT and COMPANY, INC.,
Plaintiff-Appellee
Cross Appellant,

versus

The vessels MORNING STAR, ET AL, etc.,
THE FISH MEAL COMPANY, HARVEY W. SMITH,
Defendants-Appellants
Cross Appellees,

and

TEXAS MENHADEN COMPANY,
Intervenor-Appellant
Cross Appellee.

Appeal from the United States District Court for the Eastern District of Texas

---

(September 15, 1970)

Before BELL, COLEMAN, and AINSWORTH,
Circuit Judges.

COLEMAN, Circuit Judge: This appeal presents a contractual Humpty Dumpty which no court could ever put together again. By failing in advance to protect themselves from the consequences of serious errors of judgment, the litigants have taken costly falls from a wall of their own making. They have repaired to the courts for succor, but there are situations which no court can cure. Adding to the pain of past misfortunes, we are compelled to reverse the judgment of the court below and to remand the litigation for a new trial.

I

BACKGROUND

J. Ray McDermott and Company, Inc., hereinafter referred to as McDermott, builds ships at its shipyard in Morgan City, Louisiana.

The Texas Menhaden Company (located in Sabine Pass, Texas) and The Fish Meal Company (located in Morgan City) are two of many corporations owned by the Smith family, giants of the menhaden fishing world. Harvey W. Smith was President of both companies. The companies and their President will generally be referred to in the course of this opinion as the Smith interests.

In the United States menhaden are not considered to be edible fish. Their primary use is for fertilizer and chicken feed. In other countries, particularly in Europe, menhaden are manufactured into margarine.

In the Gulf of Mexico, menhaden fishing is a seasonal activity, lasting from April to October. The menhaden are caught in shallow waters, generally at depths of from eight to twelve feet. The typical menhaden fishing boat is from 125 to 220 feet in length. It is not unusual for these boats to plow through soft mud, beneath shallow waters, to reach the menhaden schools. When a school is sighted the boat casts off two "purse boats," usually about 35 footers, which, operating under their own power and with a net between them, surround the school. By the use of hydraulically powered wenches, the nets are drawn tight around the fish. The mother ship then comes alongside and pumps the catch from the purse into the cargo holds. The fish are there kept in a chilled condition and taken to nearby plants for processing. The captains and the crews are compensated according to the catch, and the competition among fleets from about fifteen menhaden plants along the Gulf Coast may aptly be described as terrific.

McDermott shipyard in Morgan City was located about a mile from the menhaden processing plant of The Fish Meal Company and for several years McDermott had repaired the menhaden fishing boats and proclaimed that it kept in its employ a full time naval architect. Prior to the fall of 1965, however, *McDermott had never built a menhaden fishing boat.*

Alfred Davies was the manager of the menhaden processing plants owned by The Fish Meal Company at Morgan City, Louisiana, and by Texas Menhaden Company at Sabine Pass, Texas. He knew that Mc-

Dermott had never built a menhaden boat. V. J. LeBlanc was the general manager of the McDermott shipyard. In October, 1965, verbal negotiations between Davies and agents of McDermott culminated in a written contract for the construction *of eight* menhaden fishing vessels.

The proposal and acceptance on behalf of the parties read as follows:

"September 15, 1965

"Texas Menhaden Company
P. O. Box 68
Sabine Pass, Texas

Attention: Mr. Al Davies

Subject: Construction of Eight (8) 165' x 35' x 14' *Menhaden Fishing Vessels.* (Emphasis by the Court). McDermott Shipyard Proposal No. Q-1136.

Gentlemen:

"We propose to furnish labor, material, and plant facilities to construct, outfit, and deliver each of eight (8) subject vessels for the sum of Three Hundred Twenty-One Thousand Seven Hundred Sixty-Nine Dollars and No/Cents ($321,769.00), which is a total of Two Million Five Hundred Seventy-Four Thousand One Hundred Fifty-Two Dollars and No/Cents ($2,-

574,152.00) for all eight (8) vessels, in accordance with applicable specifications and subject to the following conditions.

"1. Applicable Specifications are those entitled 'Specifications for the Construction of a 165' Menhaden Fishing Vessel for Texas Menhaden Company, Sabine Pass, Texas', dated September 13, 1965, prepared by McDermott Shipyard, Morgan City, Louisiana, and the accompanying contract plans as listed therein.

"2. In connection with Item 110, Page 4 of Specifications, it is understood that Shipyard will install refrigeration equipment, fish pump, and hardening winch on their foundations. The respective refrigeration, fish hold, and hydraulic winch piping systems are not included in this proposal but will be subject to the terms of Item 109, Page 3 of Specifications.

"3. In connection with Item III, Page 7 of Specifications, we have included in our proposal coordination and witnessing of tank testing. Costs of model and towing tank tests, as well as traveling and incidental expenses, are not included.

"4. We will deliver the subject vessels floating alongside our pier on or before June 1, 1966, provided this proposal is accepted

within five (5) days of the date of this letter.

"5. Terms of payment are to be subject to a separate agreement but will be, in general, as follows:

a. The total sum will be financed by the Builder at an interest rate of six percent (6%) on the unpaid balance for a period of thirty-six (36) months.

b. Interest will start accruing on the following percentages of the unpaid balance according to the following schedule:

1) On twenty-five percent (25%) of total sum outstanding upon acceptance of proposal.

2) On fifty per cent (50%) of total sum outstanding on February 15, 1966.

3) On one hundred percent (100%) of the total sum outstanding on each vessel upon completion of each vessel, as per applicable specifications.

c. Capital and interest payments will be made at equal intervals for a pe-

riod of thirty-six (36) months from completion of each vessel, as per applicable specifications. Payment intervals are to be determined in above mentioned separate financial agreement.

"This quotation is valid for a period of ten (10) days from the date of this letter, after which time, we reserve the right to withdraw or amend the same. 'The quoted prices do not include any Louisiana State or Parish Sales or Use Taxes. If any such taxes are due, they will be paid by you or reimbursed to us if it is necessary that we pay them'. J. Ray McDermott & Co., Inc. operates in the State of Louisiana under Louisiana State Contractors License No. 246.

"We thank you for the opportunity to submit this proposal and should you find it satisfactory, please sign and return the original.

"Very truly yours,

McDERMOTT SHIPYARD
s/ V. J. LeBlanc
V. J. LeBlanc
Division Manager

VJL:ml

"ACCEPTED: TEXAS MENHADEN COMPANY
BY: s/Harvey Smith
DATE: 10/5/65".

It is at once apparent from the caption of McDermott's proposal that it agreed to build and the Smith interests expected to receive vessels suitable for menhaden fishing. It is equally apparent from paragraph 1 of the proposal that the applicable specifications were to be those prepared by McDermott.

Section 1, paragraph 101, of these specifications provided that McDermott should deliver to Texas Menhaden "an all welded, twin screw diesel powered vessel for pursing and trawling in the Gulf of Mexico". It was further specified that the design criteria for this vessel [of which there were to be eight] would provide for a free running speed, when light, of about 14 3/4 miles per hour, with a fish hold capacity of about 700 short tons of menhaden. It was additionally specified that ship draft, light, would be approximately 6 feet, 6 inches. Loaded draft would be 9 feet, 6 inches.

The contract was made in Louisiana. The ships were to be built in Louisiana and delivered in Louisiana.

The shipbuilder, with no prior experience in the field, did not build one vessel and test it with a regular menhaden crew under actual fishing conditions before building the other seven. The Smith interests did not insist on such a procedure. The Smiths wanted speedy delivery and McDermott was willing to comply. Like Admiral Farragut at Mobile, but without his famed success, both parties steamed full speed ahead with little regard for the torpedoes, until it was too late.

The first four of the projected eight vessels were delivered by McDermott in the middle of June, 1966. As per the contract, the Smiths outfitted the vessels with engines and fishing equipment. The weight of these various appurtenances, including the concrete lining in the holds, accounted for a nine inch increase in the draft of the vessels.

Two marine architects and the captains of the vessels after they had set out to fish testified that the boats were wholly unsatisfactory for the use intended and were, in fact, unseaworthy. There was testimony that with only 500 tons of fish in the holds the boats drew as much as 14 1/2 feet of water, whereas the contract specified that draft would be 9 feet, 6 inches when loaded with 700 tons of fish. The excess draft allegedly impaired the ability of the mother ship to operate in the shallow waters where menhaden are ordinarily found. The captains further testified that the boats were "out of trim" and suffered from a "quick roll" which rendered the raising and lowering of the purse boats and the loading of the fish dangerous to the crews.

McDermott's naval architect had never designed a menhaden boat. The Smith interests had no naval architect. McDermott agreed to design the boats. With the full knowledge of the Smiths the design was adapted from plans for an off shore supply boat which McDermott had never built.

Not to be outdone by McDermott's gamble, on October 28, 1966, while attempts were being made to use

four of the boats, The Fish Meal Company went ahead and executed a promissory note for the full contract price for the vessels. Harvey W. Smith, in his personal capacity, at the bottom of the note, signed a written guarantee of payment. As a condition to the execution of the note and mortgages, the Smith interests requested and received a reservation of all of Smith's rights under the construction contract. The note and preferred ship mortgages were duly registered at the Customs House in New Orleans pursuant to the Federal Ship Mortgage Act, 46 U.S.C. §911 et seq.

Later, when the boats allegedly proved to be unfit, the Smith interests, with the consent of McDermott, tried to sell them to be used for some other purpose. These efforts failed.

The result of all this was that McDermott found itself carrying a note for $3,233,891.36 (secured by preferred ship mortgages) which the Smiths refused to pay. Simultaneously, the Smiths claimed to be saddled with eight boats which were useless for menhaden fishing. Not being able to resolve their differences (or refusing to do so), the parties looked to non-seagoing courthouses for a remedy.

II

THE LITIGATION

In the United States District Court for the Eastern District of Louisiana, the Smith interests sued McDermott for breach of contract and for a declaration of

non-liability under the notes and mortgages, alleging failure of consideration.

The boats had been laid up in a freshwater bayou near Bridge City, Texas, to prevent deterioration. So, in the United States District Court for the Eastern District of Texas, at Beaumont, McDermott filed a mortgage foreclosure suit against the vessels *in rem* and also against the maker and endorser of the note, The Fish Meal Company and Harvey W. Smith, *in personam*. McDermott had the vessels seized.

McDermott then sought to dismiss, or alternatively to stay, the breach of contract action brought in New Orleans.

The upshot was that the parties STIPULATED *both* the transfer of the breach of contract action to the district court at Beaumont and the judicial sale of the vessels under the direction of that Court, the proceeds to be deposited in the Registry to await the outcome of the litigation.

After due advertisement, the vessels were sold at public auction by the United States Marshal at Beaumont. For reasons not apparent in the record the Smith interests sought no independent appraisal of the vessels prior to the Marshal's sale. Neither did McDermott. The highest bid for all eight vessels was $689,000, submitted by McDermott. The sale to McDermott was confirmed without opposition. McDermott made bond for the net proceeds of the sale, to abide the outcome of the litigation.

Thereafter, the cases were consolidated for trial. The result was that two trials proceeded simultaneously. McDermott's mortgage foreclosure action was tried to the Court and the Smith suit for breach of contract went to a jury.

The first special interrogatory submitted to the decision of the jury was: "Do you find from a preponderance of the evidence that the vessels were constructed by J. Ray McDermott and Company, Inc. in accordance with the contract specifications and drawings as amended without any material variance?"

To this the jury answered: "Yes".

At the trial level this put an end to the Smiths' law suit, except for the contention that because McDermott took advantage of a "waiver of appraisal" clause in the mortgage and allowed the mortgaged property to be sold without an appraisal no deficiency judgment could be taken against Fish Meal and Harvey Smith personally since such was prohibited by the Louisiana Deficiency Judgment Act, LSA-RS 13:4106.

The Smiths moved for a new trial because of asserted prejudicial instructions to the jury and because the verdict was contrary to the weight of the evidence. They also moved for a summary judgment in their favor as to any deficiency. These motions were denied.

As to McDermott's mortgage foreclosure action, the Court entered its own findings of fact and conclusions of law, granting judgment against Fish Meal and Harv-

ey Smith, *in personam*, for the full amount of the note, plus interest and attorneys fees, subject to a credit for the net proceeds of the Marshal's sale, and subject to further credit equal to whatever profit (if any) which McDermott might later realize from resale of the vessels. The district court was moved to the latter requirement because, as matters stood, McDermott became the owner of the vessels in question for $689,000, and it likewise became the owner of a judgment against the Smith interests, *in personam*, for over $2,500,000, when the original contract price for the vessels amounted to $2,574,152. In other words, McDermott got its $2,574,142 worth of vessels (contract price) for $689,000. In addition, McDermott acquired the engines and other valuable property installed in the vessels by the Smith interests at a cost of about a million dollars.

On the other hand, if McDermott could obtain no deficiency judgment against Fish Meal and Harvey Smith, then it simply got its boats back (plus equipment) — boats which had theretofore proven to be unsellable.

The Smith interests have appealed from both judgments, and McDermott has appealed from that portion of the judgment in the foreclosure suit which requires it to account for and to credit the deficiencies with any profit which might be realized from the subsequent sale of the vessels previously seized and sold by the Marshal.

In our opinion, the judgment on the jury verdict must be reversed because of an error in the instructions

to the jury. This likewise requires that the judgment for McDermott in the foreclosure proceeding be vacated. This renders it unnecessary that we should reach or decide the cross appeal filed by McDermott.

III

THE TRIAL

It was McDermott's position that it had delivered the ships without material variance from the contractual specifications and was entitled to be paid.

The Smith interests claimed a failure of consideration caused by McDermott's breach of contract in the following particulars:

1. Excess draft; inability to fish in shallow waters;

2. Complete uselessness of at least one-third of the hold space; lack of the contractual capacity of 700 tons;

3. Lack of trim, making it impossible to properly steer the vessels;

4. The quick roll characteristic of the vessels;

5. Inability to lower, raise, and tow the purse boats;

6. Flat bottoms on the vessels rather than the true "V" bottom required for menhaden fishing in shallow waters.

The Smiths also claimed damages for the alleged breach of contract.

McDermott countered with the contention that after the execution of the written contract the Smith interests had ordered various changes (or innovations) in the vessels which materially altered the contract and which had affected the ultimate performance of the vessels in the particulars complained of.

To this the Smiths responded that the primary requirements of the contract, suitability for menhaden fishing, draft, fish hold capacity, and general seaworthiness had never been changed; that they relied on McDermott's naval architects to preserve these indispensable features because McDermott undertook the design of the vessels to accomplish the purposes intended.

We do not set forth a witness by witness resume of the lengthy trial testimony. The evidence for one side contradicted that of the other in many particulars. McDermott's managers and Smith's managers rarely agreed on anything. The naval architects called by both sides were in material disagreement. The testimony of the ship captains as to the defects of the vessels was largely, if not altogether, uncontradicted. The credibility of the witnesses and the weight of their

testimony, if any, within the appropriate rules, were for the resolution of the jury.

In his instructions to the jury the trial judge stated, *inter alia:*

> "The Court would instruct you further that the fact that the vessels did not prove suitable for fishing would not indicate that the vessels were not constructed in accordance with the contract, because the very conception of the vessel was an innovation and it was thought, no doubt with good faith on the part of both parties, that this type of vessel would prove suitable and desirable for fishing.
>
> "[I]f you find that they were not suitable for fishing, — that in itself does not mean that the contract was breached and the vessels were not constructed in accordance with the terms of the contract."

Before the jury retired to consider its verdict, the Smiths duly objected to this language. The objection was overruled. This is the basis for one facet of the appeal.

In the conclusion of its instructions, the Court continued:

> "In making this determination you must take into consideration whether or not McDermott constructed the vessels without any material

variance, in accordance with the terms, conditions, specifications and drawings as amended and furnished the defendant. If you find that they were from a preponderance of the evidence, then you will find in favor of McDermott."

IV

THE DECISION

Both San Miguel, a graduate of M.I.T., the naval architect and chief engineer in the full time employ of McDermott, and LeBlanc, the general manager for McDermott, testified that Davies, general manager for the Smiths, selected the drawings (in McDermott's possession) of a supply boat and directed that it be converted to a vessel which could be used for menhaden fishing during the menhaden season and for trawling at other seasons. Mr. LeBlanc said that San Miguel "changed the specifications as Mr. Davies wanted them changed". Davies denied this. He claimed that he did not tell San Miguel how to draw the plans and specifications for the boats nor did he tell them what kind of boat to use as a model in their design. He contended that no one connected with Smith interests had anything to do with the design or the configuration or construction of the boat. He contended that LeBlanc told him that San Miguel would be the one who would handle the design, that he was a top notch marine architect.

The answer to these oral disputes, however, is found in the language contained in paragraph 1 of McDermott's contract proposal of September 15, 1965 [page , ante] which categorically states that the specifications are those "prepared by McDermott Shipyard, Morgan City, Louisiana, and the accompanying contract plans as listed therein".

Captain William H. Fortner took one of the vessels, the DOUBLE-O-SEVEN, to fish when it came out of McDermott's yard. He testified that the boat drew 9 feet light, that once when 75% loaded the boat drew 14 feet at the bow and 12 1/2 feet at the stern, and that San Miguel saw it. The DOUBLE-O-SEVEN went aground on one occasion while other boats were fishing all around it and had to be pulled out by a tug boat. Fortner was the only man who could steer the vessel and "not too good". He had trouble with the trim, "she would drop to one side or the other". In his opinion, the boat was not seaworthy. He agreed to serve as captain because San Miguel "told me she was going to be the best pogy boat, menhaden boat, in the Gulf, that he was a naval architect and I was not, and I thought I could be wrong about the boat". Mr. Davies also told him she would be a good boat. The boat was too flat bottomed. It could not tow purse boats. When asked if he would go back on this boat and take her to sea, he replied, "They don't have enough money".

Captain Douglas Brill, skipper of the MUD LUMP, testified to like effect and pronounced the vessel unseaworthy.

It was then stipulated that six other witnesses, listed by name, would, if called, give similar testimony with reference to their efforts to operate these boats for menhaden fishing.

A. *The Breach of Contract*

It is undisputed that these parties had a written contract. The contract proposal recites that McDermott prepared the plans and specifications. The contract therefore is entitled to a strict construction against McDermott, *Lawson v. Martin Timber Company*, 1959, 238 La. 467, 115 So.2d 821. Unambiguous contracts cannot be destroyed by ambiguous circumstances, *Cardos v. Cristadoro*, 1956, 228 La. 975, 84 So.2d 606. He who prepares the plans and specifications of a structure and afterwards contracts for its construction according to the plans and specifications is responsible for any defect or insufficiency in the specifications. He cannot escape responsibility for defectiveness of the work by taking the ground that the defect was in the specifications rather than in the work. He is responsible for both. *Barraque v. Neff*, 1942, 202 La. 360, 11 So.2d 697, citing *Louisiana Molasses Company v. LeSassier*, 52 La. Ann. 2070, 28 So. 217.

McDermott knew when it undertook the preparation of the specifications and the construction in accordance therewith it was embarking upon a new activity. McDermott's proposal stated that it was to build menhaden boats and it is clear that McDermott knew the proposed vessels would be unlike any other menhaden boat previously in use. Yet, the contract contains no

reservations or exceptions for the consequences of novelty or faulty design.

We see nothing ambiguous about the terms of this contract. There is no contention that the parties labored under any mistake or fraud. Therefore, the contract as written must govern the relationship of the parties and their respective obligations, and the intent of the parties is to be determined by the language of the contract, *Vaughan v. P. J. McInerney and Company*, La. Ct. of App., 1943, 12 So.2d 516, 518; *Bank of Napoleonville v. Knobloch & Rainold*, 1918, 144 La. 100, 80 So. 214; *Fitzgerald v. Hyland*, 1942, 199 La. 381, 6 So.2d 321.

It is true that after the execution of the instruments evidencing the original contract, changes were made in the vessels at the solicitation of Harvey Smith, such as, the stern was raised two feet higher, a ramp was installed, and the engine houses were moved forward.

There was testimony in the record that San Miguel issued no warning that these changes would interfere with the efficiency or seaworthiness of the vessels. If the changes were likely to produce negative results in these respects it was San Miguel's duty to warn of these possibilities, if they were to be chargable to the Smiths, *Kunnes v. Bryant*, La. Ct. of App., 1951, 49 So.2d 872.

Thus, we have a case in which a party contracted to construct vessels which would be menhaden boats of prescribed draft and fish hold capacity. There was

abundant testimony, if a jury had chosen to believe it, that these specifications had not been met. Obviously, the Smiths were entitled to expect delivery of seaworthy vessels. Again, there was abundant testimony, if the jury had chosen to believe it, that this had not been accomplished.

We are therefore driven inescapably to the conclusion that under the law and the facts of this case it was error for the district judge to tell the jury that the unsuitability of the vessels would not indicate that they had not been constructed in accordance with the contract. For this reason, the judgment in the breach of contract — failure of consideration action must be reversed and remanded for a new trial to be conducted consistently with the principles herein announced.

As to the complaint in admiralty against the vessels *in rem*, to foreclose the mortgages, and to obtain a deficiency judgment against the makers of the note secured by the mortgages, in his findings of fact and conclusions of law the trial court states, "The court agrees with the jury's finding that the vessels were constructed in accordance with McDermott's contract as amended and so holds". Accordingly, and since this was a consolidated proceeding, the judgment of the district court in this regard will be vacated and remanded for further proceedings not inconsistent herewith.

B. *The Deficiency Judgment*

The issue as to a deficiency judgment against The Fish Meal Company and Harvey Smith, *in personam*, remains in the case. As a matter of judicial economy and for the guidance of the trial court at the retrial of this case, we now consider that question.

The district court granted a deficiency judgment in favor of McDermott and against Fish Meal and Harvey W. Smith *in personam* for $3,233,891.36, with 6% interest per annum from August 9, 1966, plus attorneys fees and court costs, to be reduced by the sum of $666,747.25, the net amount realized from the Marshal's sale of the eight boats.

McDermott contends that this was proper under the provisions of the Ship Mortgages Act of 1920, 46 U.S.C.A. §954(a):

> "§954. Suits in personam in admiralty on default
>
> "(a) Upon the default of any term or condition of a preferred mortgage upon a vessel, the mortgagee may, in addition to all other remedies granted by this chapter, bring suit in personam in admiralty in a district court of the United States, against the mortgagor for the amount of the outstanding mortgage indebtedness secured by such vessel *or any deficiency in the full payment thereof.*" [Italicis by the Court]

When McDermott foreclosed its preferred ship mortgages and procured a sale of the vessels it did not first have them appraised as provided by the Revised Statutes of Louisiana, 13:4106, 4107:

"§4106. Deficiency judgment prohibited if sale made without appraisement

"If a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, *the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor.* [Italicis by the Court]. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as provided in the next paragraph.

"If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby."

"§4107. R.S. 13:4106 declares a public policy and the provisions thereof cannot, and shall not be waived by a debtor, but it shall only ap-

ply to mortgages, contracts, debts or other obligations made, or arising on or after August 1, 1934."

Prior to the enactment of the Ship Mortgages Act of 1920, the admiralty had no jurisdiction of a suit to foreclose a mortgage on a ship. The Act, however, granted unto admiralty exclusive jurisdiction to enforce the lien of a preferred ship mortgage. There can now be no suit to foreclose such a mortgage in a state court, *Detroit Trust Company, Trustee, v. The Thomas Barlum,* 1934, 293 U.S. 21, 32, 33, 42, 55 S.Ct. 31, 79 L.Ed. 176.

That these vessels were covered by preferred ship mortgages is not disputed. That the district court, sitting in admiralty, had exclusive jurisdiction over the foreclosures is not to be doubted.

Fish Meal and Harvey W. Smith say that because the mortgages provided for waiver of appraisal and the vessels were sold without an appraisal no deficiency arose because La. R.S. 13:4104, 4105, 4106, 4107, expressly declares that "if a mortgagee takes advantage of a waiver of appraisement and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor".

In other words, McDermott preferred to follow a course which caused the debt to be extinguished by

operation of law and ipso facto it could not provide the basis for a deficiency.

The Ship Mortgages Act is now a half century old but we find no previous case on the specific issue here involved. The parties have cited none.

We begin by saying that provisions of the Ship Mortgages Act are paramount and if a conflict exists between it and a state statute the federal statute would of course prevail.

Is there a conflict?

The difficulty is that "the Mortgage Act is not a comprehensive statute .... it contains sketchy provisions on foreclosure; .... the Mortgage Act suggests no answer to many important questions .... there is no Federal Law of mortgages, decisional or statutory, with the exception of the Mortgage Act itself". Gilmore and Black, The Law of Admiralty 9-57, pp. 590, 591. The federal decisions, sparse as they are, agree that there is no federal law of mortgages, *Bergren v. Davis and The Oil Screw called Acadia* (D.Conn., 1968) 287 F. Supp. 52, 55, citing *Southland Financial Corp. v. Oil Screw Mary Evelyn* (E.D.La., 1965) 248 F.Supp. 520, 522.

In *Bergren*, supra, in something of a similar controversy, the court noted that "the mortgage was executed in the State of Maine, the vessel's home port is there, and the mortgage was recorded there. Hence the court will look to the law of Maine".

In the case now before us the mortgage was executed in Louisiana, it was recorded in Louisiana, and although the vessels were laid up in Texas the home port [of The Fish Meal Company] was Morgan City, Louisiana.

Obviously, Louisiana cannot prohibit the taking of a deficiency judgment in an admiralty court. By the same token the obligations of the parties are to be determined from the mortgages themselves.[1] This is a substantive matter, not a procedural one. The parties are presumed to have known the Louisiana law of mortgages and to have acted accordingly. That law provided that the sale of mortgaged property under a waiver of appraisal (as here) without prior appraisal fully satisfies and discharges the debt insofar as it constitutes a personal obligation of the debtor. The law of Louisiana seems to be clear that the mortgagee may require a waiver and it may, if it wishes, sell under the terms of that waiver, but when it exercises that privilege it surrenders the right to pursue the debtor *in personam* for the balance due. The debt is extinguished and no deficiency survives. The law applies to sureties as well as to principal obligators, *Simmons v. Clark*, 1953, La. Ct. App., 64 So.2d 520.

We hold that the admiralty court under the terms of the federal statute clearly has the right to grant deficiency judgments, where deficiencies exist. To as-

---

[1]Provisions of Louisiana law are incorporated into Louisiana contracts and form a part of the contract as though expressly written therein, Dantoni v. Board of Levee Commissioners (La., 1955) 80 So.2d 81.

certain the existence or non-existence of a deficiency, the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage, especially where there is no question as to the place of execution, the place of recordation, and the home port of the vessel involved, *Bergren*, supra.

And this is true although McDermott could not have known whether there would be a deficiency, or the amount of it, until after the sale. All it had to do to protect itself on that subject was to have had a prior appraisal. It is immaterial that the sale was judicial. Judicial sales are expressly named in the statute.

Consequently, McDermott is not entitled to a deficiency judgment against Fish Meal or Harvey W. Smith.

The judgment in the breach of contract — failure of consideration case is reversed and remanded for a new trial.

The judgment of the District Court sitting in admiralty is vacated and remanded.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28496

J. RAY McDERMOTT & CO., INC.,
Plaintiff-Appellee-
Cross Appellant,

versus

The Vessels MORNING STAR, ET AL., etc.,
THE FISH MEAL COMPANY, HARVEY W. SMITH,
Defendants-Appellants-
Cross-Appellees,

and

TEXAS MENHADEN COMPANY,
Intervenor-Appellant-
Cross Appellee.

Appeals from the United States District Court for the Eastern District of Texas

---

(March 23, 1972)

Before BROWN, Chief Judge, and WISDOM*, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG,

AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, INGRAHAM and RONEY, Circuit Judges.

DYER, Circuit Judge: The question whether state or federal law governs deficiency judgments under the Ship Mortgage Act is a matter of such vital public concern that we placed this action for the foreclosure of a preferred ship mortgage en banc.

The district court granted a deficiency judgment in favor of McDermott (the shipbuilder) and against the Smith interests (the purchaser) for the difference of the amount bid on the judicial sale of the vessels and the balance of the indebtedness due on the notes secured by the preferred mortgage.

The prior opinion in this case said:

> That Law [Louisiana] provided that the sale of mortgaged property under a waiver of appraisal (as here) without prior appraisal fully satisfies and discharges the debt insofar as it constitutes a personal obligation of the debtor. The law of Louisiana seems to be clear that the mortgages may require a waiver and it may, if it wishes, sell under the terms of that waiver, but when it exercises that privilege it surrenders the right to pursue the debtor *in personam* for the balance due. The debt is extinguished

---

*Judge Wisdom did not participate in the consideration of or in the decision in this case.

and no deficiency survives...

> We hold that the admiralty court under the terms of the federal statute clearly has the right to grant deficiency judgments, where deficiencies exist. To ascertain the existence or non-existence of a deficiency, the federal law being silent on the subject, we are compelled to look to the mortgage and to state law governing rights of the parties under the mortgage . . . 431 F.2d at 714, 724.

Because of the provisions of Louisiana law concerning appraisal McDermott was held not to be entitled to a deficency judgment against the Smith interests and the judgment of the district court was vacated. We hold that the panel opinion was based upon an error of law, which we overrule. Nevertheless, we vacate the deficiency judgment to await the outcome of a new trial ordered by this Court on the breach of contract action brought by the Smith interests.

The vessels constructed by McDermott under contract with the Smith interests were sold at a public sale and the sale was confirmed by the court without an appraisal having been made. The sale brought a price insufficient to pay the debt and extinguish the mortgage. Consequently, a deficiency judgment for the difference was rendered against the Smith interests *in personam*. 46 U.S.C.A. § 945(a). Smith did not object to the sale but attacked the deficiency judgment, contending that under La.R.S. 13:4106 and 4107 a deficiency judgment is barred whenever there has been no

appraisal. Because the federal statutes regulating judicial sales do not speak to the validity *vel non* of a deficiency judgment where there has been a public sale without appraisal, Smith argues that there is a gap in the federal procedure and that the Louisiana statute, as the law of the adjacent state, should be caulked into this cranny. We disagree.

Initially, it is important to emphasize the purpose underlying the enactment of the Ship Mortgage Act of 1920. This Act is a part of the Merchant Marine Act of 1920, 46 U.S.C.A. § 861 et seq. Congress recognized that maritime matters have a great impact upon interstate and international commerce and that there was a need for a uniform body of maritime law. *See The Lottawana*, 1875, 88 U.S. (21 Wall.) 558, 577. The congressional intent in enacting this legislation was to promote and encourage the continued development of the American merchant marine. *Mastan Co. v. Steinberg*, 3 Cir. 1969, 418 F.2d 177, 179, *cert. denied*, 1970, 397 U.S. 1009. "The passage of the Ship Mortgage Act came about primarily from the necessity of affording substantial security to persons supplying essential financing to the shipping industry." *Merchants & Marine Bank v. The T. E. Welles*, 5 Cir. 1961, 289 F.2d 188, 193-4.

Although the federal courts have jurisdiction of admiralty and maritime matters because of the recognized necessity of national control over this important commercial area, *Panama R.R. Co. v. Johnson*, 1923, 264 U.S. 375, 386, prior to the enactment of the Ship Morgage Act admiralty had no jurisdiction over a suit to foreclose a mortgage on a ship. *Detroit Trust Co. v. The Barlum*, 1934, 293 U.S. 21, 32. The need for exclu-

sive jurisdiction of the admiralty court and uniformity of procedure in ship mortgage foreclosure proceedings was stressed when the Senate held its hearings on the Merchant Marine Bill. Thus the legislative history clearly shows that:

> This bill is drawn with the intent of . . . providing for a speedy and uniform practice of foreclosure in the Federal Courts instead of leaving the mortgagees to the varying procedures of the courts of the several states.

Hearings Relative to the Establishment of an American Merchant Marine, Committee on Commerce, United States Senate, 66th Cong., 2d Sess., at 933.

It is clear that Congress intended that the ready availability of credit to support interstate commerce should not be impeded by parochial limitations and that the Act would wholly and completely supersede state law and practice in every respect.

In accordance with the national scope of the Ship Mortgage Act it must be construed, if possible, to maintain the desired uniformity necessary to effectuate its purposes. Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system, it cannot be employed to contravene an act of Congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations. *Romero v. International Terminal Operating Co.*, 1959, 358 U.S. 354, 373; *Just v. Chambers*,

1941, 312 U.S. 383, 389-90; *Southern Pacific Co. v. Jensen*, 1917, 244 U.S. 205, 216.

We perceive no void in the statutory scheme here. Therefore, it is not necessary to turn to state law to implement the act with respect to deficiency judgments. Indeed, "to engraft the various nuances of state law onto federal legislation would introduce an undesirable lack of uniformity in the interpretation of Congressional enactments" and would impede the harmony and uniformity sought by the Act. *See Mastan Co. v. Steinberg, supra.*

The Ship Mortgage Act, when read together with the statutes delineating the judicial sale procedure in the federal courts forms a comprehensive procedure for the foreclosure of a preferred ship's mortgage, the sale of the vessel and any resulting deficiency adjudged against the debtor *in personam*.

46 U.S.C.A. § 951 provides that a mortgagee may enforce his lien by a suit *in rem* in admiralty. Original jurisdiction is granted exclusively to the district courts. Section 954 (a) permits the mortgagee to bring suit *in personam* against the mortgagor in admiralty for any deficiency in the amount of the indebtedness secured by the vessel. Fed.R.Civ.P. E(9) (b) provides that a judicial sale may be held prior to the completion of the foreclosure action. 28 U.S.C.A. §2004 directs that any personalty sold under order of a court must be sold in accordance with Section 2001. The latter section provides for both private and public sales and defines the prerequisites necessary for their validity.

Section 2001 (b) requires, *inter alia*, that the court appoint three disinterested persons to appraise the property before it can confirm a *private* sale. There is no appraisal requirement under Section 2001 (a) for a *public* sale.

Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded. *See e.g., Federal Trade Commission v. Sun Oil Co.*, 1963, 371 U.S. 505, 514-15 and *Pena-Cabanillas v. United States*, 9 Cir. 1968, 394 F.2d 785, 789-90. "We are not at liberty to imply a condition which is opposed to the explicit terms of the statute... To [so] hold . . . is not to construe the act but to amend it." *Detroit Trust Co. v. The Barlum, supra* at 38.

Since Congress established the necessity of appraisal before private sale and excluded the necessity for it at public sale and instead provided for the public sale to be under the court's direction, we are not at liberty to disregard the explicit legislative mandate and impose additional requirements borrowed from state law for a public sale.

It is well settled that the determination as to the fairness of the sale price of a vessel at public sale is left to the sound discretion of the district court, that is, the court can refuse to confirm the sale if it feels that the price is grossly inadequate. *United States v. Wells*, 5 Cir. 1968, 403 F.2d 596, 598; *Ghezzi v. Foss Launch & Tug Co.*, 9 Cir. 1963, 321 F.2d 421, 425. A mortgagor is therefore fully protected without the requirement of an appraisal under the comprehensive procedure provided by federal law.

We hold that the Louisiana statute may not limit or restrict the application of the Ship Mortgage Act or affect the uniform application of that Act so as to defeat the Congressional purposes in adopting such legislation.

The panel opinion vacated the deficiency judgment in reliance upon Louisiana law. We agree that the deficiency judgment must be vacated but for a different reason. The liability under the contract upon which the mortgage is based has been remanded to the district court for a new trial. Until that action is decided, any application for a deficiency judgment would be premature. The sale and its confirmation were not before the Court; consequently, they remain unaffected.

The deficiency judgment is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

VACATED and REMANDED.

COLEMAN, Circuit Judge, with whom BELL and AINSWORTH, Circuit Judges join, dissenting:

I adhere to the views originally expressed in the panel opinion, 431 F.2d 714. The effect of that decision was that there is no federal law of mortgages; the mortgagors, mortgagees, and guarantors chose to define their liabilities in exact keeping with the Louisiana statutes; and Admiralty courts have no jurisdiction to rewrite the contract. In my opinion, the Ship Mortgage Act contains nothing which would deny the part-

ies this right and its silence should not authorize court-made contracts in search of some kind of undefined "uniformity."

In short, it is my view that once a mortgage is made the Act provides a method for its registration and for the enforcement of its terms. The Act makes no attempt to prescribe the terms upon which parties may voluntarily bind themselves. Hence, striving for "uniformity", the en banc Court has missed the focal point of the panel decision of this controversy. Surely, it does not mean to hold that because an admiralty court is empowered to ascertain and adjudge a deficiency it can thereby impose one which is expressly negated by the contract.

Moreover, I flinch from the injustice of the result. If McDermott prevails on the issue of breach of contract, then it is to be permitted not only to keep the vessels but to be paid for them as well (all but a small part of the originally agreed purchase price). Moreover, McDermott keeps all the costly equipment installed by Fish Meal. I think the confirmation of the judicial sale sought to be re-opened. This was not a judicial sale to a third party for value. The mortgagee was the purchaser and it is still before the Court.

I respectfully dissent and, for my part, reiterate all that was said in the original panel opinion.

I am authorized by Judges Bell and Ainsworth, the other members of the original panel, to say that they join in this dissent.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

"Texas Menhaden Company
P. O. Box 68
Sabine Pass, Texas

Attention: Mr. Al Davies

Subject: Construction of Eight (8) 165' x 35' x 14' Menhaden Fishing Vessels. McDermott Shipyard Proposal No. Q-1136.

Gentlemen:

We propose to furnish labor, material, and plant facilities to construct, outfit, and deliver each of eight (8) subject vessels for the sum of Three Hundred Twenty-One Thousand Seven Hundred Sixty-Nine Dollars and No/Cents ($321,769.00), which is a total of Two Million Five Hundred Seventy-Four Thousand One Hundred Fifty-Two Dollars and No/Cents ($2,574,152.00) for all eight (8) vessels, in accordance with applicable specifications and subject to the following conditions.

1. Applicable Specifications are those entitled 'Specifications for the Construction of a 165' Menhaden Fishing Vessel for Texas Menhaden Company, Sabine Pass, Texas', dated September 13, 1965, prepared by McDermott Shipyard, Morgan City, Louisiana, and the accompanying contract plans as listed therein.

2. In connection with Item 110, Page 4 of Specifications, it is understood that Shipyard will install refrigeration equipment, fish pump, and hardening winch on their foundations. The respective refrigeration, fish hold, and hydraulic winch piping systems are not included in this proposal but will be subject to

to the terms of Item 109, Page 3 of Specifications.

3. In connection with Item 111, Page 7 of Specifications, we have included in our proposal coordination and witnessing of tank testing. Costs of model and towing tank tests, as well as traveling and incidental expenses, are not included.

4. We will deliver the subject vessels floating alongside our pier on or before June 1, 1966, provided this proposal is accepted within five (5) days of the date of this letter.

5. Terms of payment are to be subject to a separate agreement but will be, in general, as follows:

   a. The total sum will be financed by the Builder at an interest rate of six percent (6%) on the unpaid balance for a period of thirty-six (36) months.

   b. Interest will start accruing on the following percentages of the unpaid balance according to the following schedule:

      1) On twenty-five percent (25%) of total sum outstanding upon acceptance of proposal.

      2) On fifty percent (50%) of total sum outstanding on February 15, 1966.

      3) On one hundred percent (100%) of the total sum outstanding on each vessel upon completion of each vessel, as per applicable specifications.

c. Capital and interest payments will be made at equal intervals for a period of thirty-six (36) months from completion of each vessel, as per applicable specifications. Payment intervals are to be determined in above mentioned separate financial agreement.

This quotation is valid for a period of ten (10) days from the date of this letter, after which time, we reserve the right to withdraw or amend the same.

The quoted prices do not include any Louisiana State or Parish Sales or Use Taxes. If any such taxes are due, they will be paid by you or reimbursed to us if it is necessary that we pay them. J. Ray McDermott &Co., Inc. operates in the State of Louisiana under Louisiana State Contractors License No. 246.

We thank you for the opportunity to submit this proposal and should you find it satisfactory, please sign and return the original.

Very truly yours,

McDERMOTT SHIPYARD

s/ V. J. LeBlanc
V. J. LeBlanc
Division Manager

VJL:ml

ACCEPTED: TEXAS MENHADEN CO.

BY: s/ Harvey Smith

DATE: 10/5/65

CERTIORARI DENIED